THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL
200 PORTLAND STREET
BOSTON, MASSACHUSETTS 02114

TOM REILLY
ATTORNEY GENERAL

(617) 727-2200

October 16, 2000

SENT VIA E-MAIL, U.S. MAIL AND/OR FEDERAL EXPRESS

Magalie Roman Salas, Secretary
Federal Communications Commission
Portals II, 445 12th Street S.W.
Suite CY-B402
Washington, DC 20554

re: In the Matter of Application by Verizon New England, Inc., for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of Massachusetts (CC Docket No. 00-176).

Dear Ms. Salas:

Enclosed for filing in the above matter please find one original and seven hard copies and one 3.5 inch computer diskette containing the Massachusetts Attorney General's Comments in the above-referenced proceeding. Please stamp one hard copy and return it to us in the enclosed prepaid, self-addressed envelope. I have filed a copy of the comments electronically with the Commission's ECFS service (proceeding number 00-176) and, as directed in the September 22, 2000 Public Notice, have sent twelve copies to Janice Myles of the Policy and Program Planning Division, and one copy to ITS.

Sincerely,

Karlen J. Reed
Assistant Attorney General
Regulated Industries Division

KJR/kr
Enc.
cc: Janice Myles, CCB (w/12 enc.)
International Transcription Service (w/enc.)
Attached Service List (w/enc.)

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Application by Verizon New England Inc. for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of Massachusetts	)	CC Docket 00-176

MASSACHUSETTS ATTORNEY GENERAL'S COMMENTS ON VERIZON NEW ENGLAND, INC.'S APPLICATION FOR AUTHORIZATION UNDER SECTION 271 OF THE COMMUNICATIONS ACT TO PROVIDE IN-REGION, INTERLATA SERVICE IN THE STATE OF MASSACHUSETTS

Respectfully submitted,

THOMAS F. REILLY
MASSACHUSETTS ATTORNEY GENERAL

By: George B. Dean, Chief
Karlen J. Reed
Assistant Attorneys General
Regulated Industries Division
Public Protection Bureau
200 Portland Street, 4th Floor
Boston, MA 02114
(617) 727-2200

Dated: October 16, 2000

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Before the
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In the Matter of Application by Verizon New England Inc. for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of Massachusetts	)))))	CC Docket 00-176

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The Attorney General of the Commonwealth of Massachusetts, Thomas F. Reilly ("Massachusetts Attorney General"), urges the Federal Communications Commission ("FCC" or "Commission") to withhold approval of the September 22, 2000, Application ("Application") filed by Verizon New England, Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) and Verizon Global Networks, Inc. (collectively, "Verizon" or "the Company"), with the Commission for authority to provide in-region interLATA service in the Commonwealth of Massachusetts pursuant to Section 271 of the Telecommunications Act of 1996.[1] The Commission should deny the Application because Verizon has not demonstrated that it has satisfied Checklist Item Number 2 (Unbundled Network Elements or "UNEs"), Checklist Item Number 3 (Pole Attachments), and Checklist Item Number 4 (UNE loops - hot cut scoring), as required under the Act.[2]

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[1] The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("the Act").

[2] These three Checklist Items are codified as 47 U.S.C. § 271(c)(2)(B)(ii - iv) of the Act.

I. SUMMARY OF ARGUMENT

As a requirement for entry into the long distance market in Massachusetts, Verizon must demonstrate that it has opened irreversibly its local markets to competition. This demonstration requires, among other things, satisfaction of the fourteen point checklist of items contained in Section 271 of the Act ("Checklist"). The Commission should not approve Verizon's Application at this time because Verizon has not demonstrated satisfaction of three Checklist Items:

(1) that it provides nondiscriminatory access to unbundled network elements (Checklist Item Number 2);

(2) that it provides nondiscriminatory access to its telephone poles and attachments (Checklist Item Number 3); and

(3) that it provides nondiscriminatory access to unbundled loops (Checklist Item Number 4).

This conclusion is reinforced by the fact that the types of state mechanisms that the Commission has relied upon in previous Section 271 orders to provide for post-approval monitoring and enforcement are not sufficient in Massachusetts to ensure that Verizon will continue to meet its Section 271 obligations after entry into the long distance market.

II. ARGUMENT

A. Verizon Has Not Complied With Checklist Items Numbers 2, 3 and 4.

Verizon has failed to demonstrate that it has opened the local market to competition as measured by Checklist Items Numbers 2, 3 and 4 regarding UNE pricing, pole attachments, and

unbundled loops (scoring hot cuts). The Attorney General will discuss these Checklist Items in the order of their estimated significance in affecting local market competition.

1. Verizon has not satisfied Checklist Item Number 2 - UNE Pricing

Verizon has not demonstrated its compliance with Checklist Item Number 2 regarding UNE pricing. Unrebutted record evidence indicates that Verizon's UNE switching prices are excessive, not TELRIC-based, and create a price squeeze that is a barrier to market entry for Verizon's competitors. In particular, unrebutted evidence shows that, at least in certain circumstances, Verizon's UNE switching rates result in wholesale costs to competitors that exceed the Company's retail rates for the same services. The Massachusetts Attorney General submits that, based on past Commission precedent on the resolution of pricing disputes, the Commission should not find that the Company has demonstrated satisfaction of Checklist Item Number 2 unless and until the Massachusetts Department of Telecommunications and Energy ("DTE") establishes interim rates, opens an investigation into the price squeeze issues, and provides that the interim rates are subject to true-up (refund).[3]

Unrebutted evidence supports findings that: (1) Verizon's Massachusetts UNE switching prices for port and switching usage are multiples of the analogous rates in New York and Pennsylvania (50 to 200 percent in the case of usage rates), and (2) the Massachusetts UNE switching prices are based on switch "costs" that are inconsistent with both the FCC's TELRIC

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[3] On October 13, 2000, Verizon filed proposed revisions to its UNE line ports, local switching and transport usage rates and reciprocal compensation charges in the form tariff revisions to Tariff No. 17. Although the filing was represented to accomplish the adoption of the analogous Verizon UNE rates now in place in New York, the Massachusetts Attorney General has not yet had an opportunity to review that filing and will address that filing in his Reply Comments.

benchmarks and the Company's own accounting of its switch costs. First, WorldCom has provided unrebutted evidence that Verizon's average monthly switching usage charge in Massachusetts is $15.83, whereas it is $10.60 in New York and $5.02 in Pennsylvania (WorldCom Ex Parte Presentation [October 2, 2000], CC Docket 00-176, Part 2 at 2 ["WorldCom Ex Parte"]) and that Verizon's monthly switching port charge in Massachusetts is $4.49, whereas it is $2.50 in New York and $1.90 in Pennsylvania (May 18, 2000 letter to Mary Cottrell from Christopher J. McDonald re: WorldCom's Suggested Course of Action; Tr. Vol. 24, pp. 4632-4636). The Company has not attempted to rebut this evidence, much less provide any rationale that could support such a divergence in the cost for the same services in different states. Even though the Z-Tel agreement included lower, promotional switching usage rates — $14.57 (WorldCom Ex Parte, Part 2 at 2) — the discrepancy remains.

Second, the Verizon UNE switching rates are based on the Company's assertion that its TELRIC switching "costs" are $2.6 billion, whereas the Commission's TELRIC model indicates that the costs should be $500 million and the Company's own books show a contemporaneous (*i.e.*, 1995) gross investment of $1.4 billion and a net depreciated investment of $600 million (WorldCom Ex Parte, Part 1 at 17-18). These circumstances, together with the fact that the Company's average retail price for these local service elements is $24 per month (May 18, 2000 letter to Mary Cottrell from Christopher J. McDonald re: WorldCom's Suggested Course of Action; Tr. Vol. 24, pp. 4632), constitute a clear showing that there is a real question regarding the appropriateness of the Company's UNE prices, whether they are TELRIC-based, and whether they are unjust, unreasonable and create an anti-competitive barrier to entry.

This unrebutted evidence of a price squeeze, creating an anti-competitive barrier to market entry, raises a pricing dispute of the type which the Commission addressed in its New York and Texas Approval Orders.[4] In these Orders, the Commission determined that such pricing disputes would not result in denial of a Section 271 application so long as: (1) the state commission is currently considering the matter; (2) interim rates are in place pending resolution of the dispute; (3) the state commission demonstrates a commitment to following the FCC's TELRIC pricing rules; and (4) the interim rates provide for refunds or true-ups once permanent rates are set.[5] Three of the four conditions do not exist in Massachusetts.[6] The DTE is not currently considering the matter and no interim rates are in place, so there is no provision for true-up/refunds once permanent rates are set.[7]

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[4] *In the Matter of Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, Memorandum Opinion and Order, CC Docket No. 99-295, (rel. December 22, 1999) ("New York Approval Order") at ¶¶ 237-262; *In the Matter of Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc d/b/a Southwestern Bell Long Distance*, Memorandum Opinion and Order, CC Docket No. 00-65 (rel. June 30, 2000) ("Texas Approval Order") at ¶¶ 231-242.

[5] New York Approval Order at ¶¶ 250, 257-260; Texas Approval Order at ¶¶ 236, 237, 241.

[6] The Massachusetts Attorney General does not question that the DTE is committed to follow the FCC's TELRIC pricing rules.

[7] It should be emphasized that this issue is not being raised here for the first time and that the Massachusetts Attorney General and others sought to have this issue addressed in a timely manner that would have avoided the need to withhold approval of the Company's application at this time. The need to examine some or all of the Company's recurring UNE rates was raised as early as the March 13, 2000, petition by AT&T Communications of New England ("AT&T") seeing an investigation into the Company's UNE rates. WorldCom and Z-Tel submitted comments and testimony to support that request, alleging that the Company's UNE switching

(continued...)

2. Verizon has not satisfied Checklist Item Number 3 (Pole Attachments)

Verizon has not demonstrated that it provides access to poles, ducts, conduits, and rights-of-way under terms and prices that are reasonable and nondiscriminatory. Unrebutted record evidence shows that Verizon's existing policies allow it to favor itself over other parties. In particular, Verizon requires that competitors move their pole attachments within 15 days after it requests access to a pole, but allows itself up to seven and one-half months to comply with a competitor's request for access;[8] it requires that it be allowed to reserve space on poles for one year, but allows competitive local exchange carriers ("CLECs") to reserve pole space for only 90 days;[9] and it requires CLECs to "tag" or identify their lines, but does not tag its own lines.[10]

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[7](...continued)
prices (port and usage) are excessive, not TELRIC-based, and create a price squeeze that is a barrier to market entry. See Petition of AT&T, dated March 13, 2000; comments filed by WorldCom on March 23, 2000, and May 18, 2000; comments filed by Z-Tel on April 12, 2000; and Tr. Vol. 24 at 4628-4671, 4673-4677. WorldCom suggested, in its May 18 comments, a procedural schedule that provided for resolution of the essential issues within five months. While the Massachusetts Attorney General urged the Department to open such an investigation in a pleading filed on May 30, 2000 (included as "Attachment B"), the DTE declined to open an investigation. The DTE based its decision on the following grounds: (1) Verizon and Z-Tel had recently entered into an interconnection agreement amendment that offered promotional discounts with reduced switching charges that AT&T, WorldCom and others could adopt; (2) the current five-year-old prices were based on a TELRIC study; and (3) it would be inefficient to conduct an investigation while the FCC's TELRIC pricing rules area in flux due to the Eighth Circuit's recent decision regarding those pricing rules. DTE 99-271, Letter Order (July 28, 2000) at 3.

[8] See generally pages 13-29 of the July 18, 2000 comments filed by the New England Cable Television Association ("NECTA") in DTE 99-271, and Tr. Vol. 20, pages 4099-4200.

[9] *Id.*

[10] *Id.*

Clearly, these disparities in treatment do not represent nondiscriminatory access. The Massachusetts Attorney General, therefore, submits that until those issues are resolved, the Commission should not grant Verizon its Section 271 approval in Massachusetts.[11]

3. Verizon has not satisfied Checklist Item Number 4 - Unbundled Loops (Hot Cuts)

Verizon has not demonstrated that it is providing nondiscriminatory access to unbundled loops because Verizon has not yet resolved a dispute over a "hot cut" data scoring problem raised during the course of hearings before the DTE. In particular, AT&T asserted that Verizon did not measure its hot cut misses accurately, asserting that Verizon miscategorized at least five percent of its orders.[12] While Verizon contends that AT&T's claims are erroneous,[13] it remains unclear whether Verizon is accurately reflecting its hot cut performance.[14] The Commission stated that hot cut deficiencies was a critical factor in the New York and Texas Approval Orders, so any

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[11] Verizon stated during final oral arguments that it is willing to negotiate a resolution to end this dispute of discriminatory treatment of competitors (Tr. Vol. 28 at 5622), but absent record evidence of such a resolution that is found to be consistent with the public interest, there is no basis upon the Commission can conclude that this Checklist Item has been satisfied.

[12] Tr. Vol. 23 at 4435; Comments of AT&T Communications of New England, Inc. Regarding Partial Data Reconciliation, DTE 99-271, filed September 28, 2000 ("AT&T September 28 Comments").

[13] Tr. Vol. 27 at 4411.

[14] AT&T insists, in its September 28, 2000 Comments, that the data discrepancy has not been reconciled and is awaiting the DTE's resolution of the issue. AT&T September 28, 2000 Comments, DTE 99-271, at 5.

unresolved hot cut issue merits special attention.[15] Absent evidence that the hot cut scoring problem raised by AT&T is solved, Verizon has not demonstrated that it has met all its obligations to provide nondiscriminatory access to unbundled loops.

B. Existing State Mechanisms Are Not Sufficient To Assure Verizon's Continued Compliance With Checklist Items.

As part of its Section 271(d)(3)(C) "public interest" analysis,[16] the Commission considers the presence of related state enforcement mechanisms in evaluating an applicant's satisfaction of the 14-point Checklist. These mechanisms in Massachusetts are not sufficient to ensure that Verizon will continue to comply with the Checklist.[17] First, there remain questions concerning whether Verizon intentionally misled the DTE and other parties during their consideration of the Massachusetts Performance Assurance Plan ("PAP").[18] Second, the DTE has yet to finalize its

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[15] New York Approval Order at ¶¶ 278, 291-309; Texas Approval Order at ¶¶ 256-273.

[16] Section 271(d)(3)(C) provides that: "The Commission shall not approve the authorization requested in an application submitted under paragraph (1) unless it finds that - (C) the requested authorization is consistent with the public interest, convenience, and necessity."

[17] The Massachusetts Attorney General assumes that in the event Verizon is ultimately allowed to enter the long distance market, the Commission will exercise its post-approval monitoring and enforcement authority under Section 271(d)(6), if necessary, to suspend or revoke Verizon's interLATA authority, as described in the New York Approval Order at ¶¶ 446-453.

[18] On September 28, 2000, AT&T filed a Motion to Reconsider the PAP, in which it alleged that Verizon has intentionally misrepresented or failed to identify six additional key differences between the PAP approved in the New York Approval Order and that proposed by Verizon on April 25, 2000. In addition to revisions to the domain clustering section, the alleged differences concern the elimination of (1) scoring for small sample sizes, (2) a bill credit allocation method, (3) provision for a refund check, instead of bill credits for carriers no longer doing business within the state, (4) electronic data interface in "special provisions" and (5) resale flow-through metrics from the Massachusetts PAP. AT&T also asked the DTE to clarify issues regarding

(continued...)

expedited procedures to resolve carrier-against-carrier disputes (*Accelerated "Rocket" Docket)*, D.T.E. 00-39.[19]

III. CONCLUSION.

The Commission should not approve the application by Verizon to enter the long distance Massachusetts market because it has not demonstrated compliance with the entire 14-point Competitive Checklist contained in Section 271 of the Act. At this time there remain unsatisfied at least three Checklist items: (1) UNE pricing (Checklist Item Number 2), (2) Pole Attachments (Checklist Item Number 3), and (3) UNE loop hot cuts (Checklist Item Number 4).

Respectfully submitted,

THOMAS F. REILLY
MASSACHUSETTS ATTORNEY GENERAL

By: George B. Dean, Chief
Karlen J. Reed
Assistant Attorneys General
Regulated Industries Division
200 Portland Street, 4th Floor
Boston, MA 02114
(617) 727-2200

Dated: October 16, 2000

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[18](...continued)
procedural triggers, audit requirements, and Verizon's annual review.

[19] Rhythms Links filed a motion to reconsider the sufficiency of the Massachusetts PAP on the grounds that the PAP does not contain enough DSL metrics (Rhythms Motion for Reconsideration, September 25, 2000; See also Attachment A at 2, and Attachment C at 2, 9-10). The DTE has not addressed this motion, but the DTE has ordered that new DSL metrics presently under consideration in New York shall be incorporated into the Massachusetts PAP upon their adoption by the New York Public Service Commission.

ATTACHMENT A

MASSACHUSETTS ATTORNEY GENERAL'S APRIL 25, 2000 COMMENTS TO THE DTE IN DTE 99-271

THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL
200 PORTLAND STREET
BOSTON, MASSACHUSETTS 02114

TOM REILLY
ATTORNEY GENERAL

(617) 727-2200

April 25, 2000

Sent via e-mail and either fax, hand-delivery or U.S. Mail

Mary L. Cottrell, Secretary
Massachusetts Department of Telecommunications and Energy
One South Station, 2nd Floor
Boston, MA 02110

re: Bell Atlantic's Section 271 Filing, D.T.E. 99-271

Dear Secretary Cottrell:

Enclosed for filing please find the Comments of the Attorney General on the content and structure of a Performance Assurance Plan ("PAP") in the above docket pursuant to the March 28, 2000, Memorandum of the Hearing Officers, together with a Certificate of Service.

Sincerely,

Karlen J. Reed
Assistant Attorney General
Regulated Industries Division

KJR/kr
cc: Robert Howley, Hearing Officer (w/enc.)
Cathy Carpino, Hearing Officer (w/enc.)
Tina W. Chin, Hearing Officer (w/enc.)
Service list for D.T.E. 99-271 (w/enc.)

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Inquiry by the Department of Telecommunications and Energy pursuant to Section 271 of the Telecommunications Act of 1996 into the Compliance Filing of New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts as part of its application to the Federal Communications Commission for entry into the in-region interLATA (long distance) telephone market.	)	D.T.E. 99-271

COMMENTS OF THE ATTORNEY GENERAL
ON THE PERFORMANCE ASSURANCE PLAN

Pursuant to the March 28, 2000, Memorandum of the Hearing Officers, the Attorney General recommends that the Department of Telecommunications and Energy ("Department") adopt a Performance Assurance Plan ("PAP") for Bell Atlantic-Massachusetts ("BA-MA") that incorporates the Bell Atlantic-New York ("BA-NY") Amended PAP filed April 7, 2000,[1] modified for Massachusetts-specific conditions and real-life application of the PAP.

[1] *See* New York Public Service Commission ("NYPSC") Cases 97-C-0271 and 99-C-0949 - ***Bell Atlantic Compliance Filing*** - Performance Assurance Plan, filed April 7, 2000. A copy of the updated BA-NY PAP can be downloaded from the NYPSC's 271 web site, <www.dps.state.ny.us/tel271.htm>.

I. INTRODUCTION

As part of the Department's investigation into BA-MA's draft filing under Section 271 of the Telecommunications Act of 1996 for entry into the in-region interLATA (long distance) telephone service market, the Department sought recommendations for Performance Assurance Plans ("PAP") from BA-MA and other participants in this docket. The Attorney General urges the Department to adopt a PAP based on the BA-NY PAP, including three important elements:

(1) The BA-MA PAP should include an annual penalty cap of at least $278 million to deter BA-MA from "backsliding" -- providing substandard or discriminatory services to competitive local exchange carriers ("CLECs") -- if and when the Federal Communications Commission ("FCC") approves BA-MA's Section 271 application. A PAP cap at this level will encourage BA-MA to resolve promptly all PAP-related compliance problems, and can be used to compensate CLECs who suffer from substandard service they receive from BA-MA.

(2) The BA-MA PAP must allow the Department to revise the Carrier-to-Carrier ("C2C") performance metrics, the PAP cap, and the Change Control Assurance Plan ("CCAP") as necessary.

(3) PAP performance data must be validated using a Quality Assurance Program ("QAP"). Consumers should not pay for BA-MA's penalties and lost revenues resulting from BA-MA's below-par performance under the PAP and CCAP.

II. THE PAP CAP MUST BE HIGH ENOUGH TO DETER BACKSLIDING, ENCOURAGE PROMPT PROBLEM-SOLVING, AND COMPENSATE CLECS.

The Attorney General submits that the Department should set a penalty cap at a level that provides a meaningful incentive for BA-MA not to backslide on its Section 271 commitments to CLECs, to solve PAP-compliance problems (such as BA-NY's current operations support systems ["OSS"] problems), and to compensate CLECs who suffer if BA-MA does not cooperate in opening the local markets. Massachusetts consumers ultimately will bear the burden of any substandard conduct -- which will defeat the Congressional policy goals of securing improved

services at lower prices by fostering competition in Massachusetts -- and the Department must adopt a PAP with sufficiently robust penalty provisions to minimize that burden.

The NYPSC's experience suggests that the PAP cap formula set by the FCC[2] -- which produces a BA-MA cap of $142 million (about 36% of BA-MA's total profits derived from local exchange service for 1999 ["Total Net Return"]) -- is inadequate. This formula should be revised in light of New York's real-life experience following the FCC's approval of BA-NY's Section 271 application. The Department should select a PAP cap within a range of no less than $162 million (which represents 41% of BA-MA's 1999 Total Net Return,[3]) and no more than

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[2] The FCC PAP cap penalty formula is based on BA-NY's net revenues derived from local exchange service. The FCC evaluated whether the BA-NY PAP Cap was sufficient to deter substandard performance by comparing the $269 million PAP Cap to a calculation of BA-NY's "Total Net Return" using the FCC's Automated Reporting Management Information System ("ARMIS") data. The Total Net Return represents the total operating revenue less operating expenses and operating taxes, and is a reasonable approximation of total profits derived from local exchange service, according to the FCC. *In the Matter of Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, CC Docket No. 99-295, FCC 99-404, Memorandum Opinion and Order (released December 22, 1999) ("FCC New York Order") at ¶ 436. The FCC's formula incorporates both interstate and intrastate net revenues because the FCC found that BA-NY may derive benefits in long distance from retaining local market share. *Id.* The Total Net Return figure combines the interstate net return (column h, line 1915) with the computed net intrastate return, which combined the total intrastate operating revenues (column g, line 1090) and other operating income (column g, line 1290), less operating expenses (column g, line 1190), nonoperating items (column g, line 1390), and annual taxes (column g, lines 1490 and 1590). ARMIS 43-01 Annual Summary Report, Table 1, Cost and Revenue Table (1998); FCC New York Order at ¶ 436, n. 1332.

[3] The NYPSC's former PAP cap, $269 million, represents 36% of BA-NY's 1998 Total Net Return, and the FCC determined that the NYPSC's PAP cap was sufficient, in theory, to deter substandard performance and compensate affected CLECs; however, as discussed herein, the NYPSC subsequently raised that cap to $303 million, consisting of $24 million for additional metrics in response to real-life experience and $10 million in additional bill credits to CLECs for substandard service. FCC New York Order at ¶ 436; NYPSC Case Nos. 00-C-0008, 00-C-0009, and 99-C-0949, March 23, 2000, Order Directing Market Adjustments and Amending